Supreme Court, U.S.
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NO. 94-1545

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

NORTH GEORGIA ELECTRIC MEMBERSHIP CORPORATION,
Petitioner,

v.

CITY OF CALHOUN, GEORGIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

(1) Whether the Tennessee Valley Authority Act of 1933, as amended, specifically 16 U.S.C. §831(l), exempts North Georgia Electric Membership Corporation, a Georgia Corporation, from taxation by the City of Calhoun, Georgia, under Calhoun Ordinance No. 493.

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Plaintiff:

North Georgia Electric Membership Corporation

Defendant:

City of Calhoun, Georgia

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STATEMENT OF THE CASE

A. PROCEEDINGS BELOW

In 1992, the City of Calhoun, Georgia ("Calhoun" or "City") duly adopted Ordinance No. 493 in order to impose and collect a four (4%) percent gross receipts business tax on Petitioner, North Georgia Electric Membership Corporation ("North Georgia EMC"), which is a secondary electric supplier[1] distributing electricity at retail in Calhoun that refused to accept a franchise requiring it to pay a four (4%) percent franchise fee, which is paid by the only other secondary electric supplier in Calhoun, the Georgia Power Company ("Georgia Power"). North Georgia EMC refused to pay the tax imposed under Ordinance 493, claiming that a section of the Tennessee Valley Authority Act of 1933 ("TVA Act"), specifically 16 U.S.C. §831(l) ("Section 831(l)") granted it an exemption from taxation when the statute was amended in 1940, despite the fact that North Georgia EMC has paid ad valorem taxes to Calhoun for many years, and had admittedly paid other taxes, including franchise fees, to another Georgia city as well.

Following adoption of Ordinance No. 493, North Georgia EMC brought an action for declaratory judgment and injunctive relief claiming, *inter alia*, that it was granted an exemption from the tax under Section 831(l) of the TVA Act. The Superior Court of Gordon County granted Calhoun's Motion for Summary Judgment on January 11, 1994,[2] and this decision was affirmed by the Georgia Supreme Court on November 28, 1994.[3] As discussed more fully below, the relevant portion of Section 831(l) of the TVA Act was added to the TVA Act in 1940 to clarify that TVA, and only TVA, would not in any way be subject to state and local taxation even though it was required to make "payments in

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[1] O.C.G.A. §46-3-3(8).

[2] *North Georgia Electric Membership Corporation v. City of Calhoun*, No. 27616 (Superior Court of Gordon County, Georgia, Jan. 11, 1994). A copy of this decision is attached to the Petition for Writ of Certioriari, App. at 12a.

[3] *North Georgia Electric Membership Corporation v. City of Calhoun*, 264 Ga. 769 (1994). A copy of this decision is attached to the Petition for Writ of Certioriari, App. at 1a.

lieu of taxes" to compensate state and local governments for lost tax revenues. The fundamental flaw in North Georgia EMC's argument is that the operation of North Georgia EMC is simply not an operation of the United States Government. Section 831(l) has absolutely no applicability to the purchasers of TVA power like North Georgia EMC. This fact is clear from a reading of Section 831(l), as well as by crystal-clear legislative history, long-standing interpretation by TVA, and complete acquiescence by Congress.

North Georgia EMC's discovery of its alleged fifty-year-old tax break is the result of three aberrant decisions of an Alabama federal district court[4] which was not presented with the extensive record considered by the Georgia courts, and which record was presented in a subsequent Alabama case which flatly rejected these three decisions from the Northern District of Alabama.[5]

North Georgia EMC has attempted to rely on these three unpublished decisions from the Northern District of Alabama for its theory of tax exemption, but even a cursory review of those opinions demonstrates that their holdings are unsupported by the statute and the record when compared to the decision of the Georgia Supreme Court below and to the decision in *City of Centre, Alabama et al. v. Cherokee Electric Cooperative et al.*, Civil Action No. CV-92-009, (Cherokee, Ala. Cir. Ct. July 23, 1993). Besides being unpersuasive, the judgments of the Northern District of Alabama in *Cullman*, *Courtland* and *Sheffield* are void, because in each case the court lacked subject matter jurisdiction. *Kalb v. Feurstein*, 308 U.S. 433 (1940). The Tax Injunction Act, 28

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[4] *City of Sheffield v. Town of Cherokee*, No. 89-AR-5073-NW (N.D. Ala. Oct. 12, 1989); *Town of Courtland v. Town of North Courtland*, No. 90-L-1346-NE (N.D. Ala. Dec. 28, 1990); and *Cullman Electric Co-op v. City of Cullman*, No. CV-91-N-665-NE (N.D. Ala. Aug. 30, 1991), *appeal dismissed* (11th Cir. Jan. 15, 1992). Copies of these decisions are attached to the Petition for Writ of Certiorari, App. at 58a, 70a and 83a, respectively.

[5] *City of Centre, Alabama et al. v. Cherokee Electric Cooperative et al.*, No. CV-92-009, (Cherokee, Ala. Cir. Ct. July 23, 1993) (appeal pending, Alabama Supreme Court). A copy of this decision is attached hereto, App. at A-1. *Centre* has been briefed and argued before the Alabama Supreme court, and is awaiting decision.

U.S.C. §1341, deprived these courts of jurisdiction over those declaratory judgment actions where the sole issue was the validity of state taxes. *North Georgia Electric Membership Corporation v. City of Calhoun, Georgia*, 989 F.2d 429 (11th Cir. 1993); *California v. Grace Brethren Church*, 457 U.S. 493 (1982). Unfortunately, none of the parties in the Alabama federal cases raised this issue of subject matter jurisdiction, but the lack of subject matter jurisdiction was later even acknowledged by the same Alabama federal court in a subsequent decision involving the same judge that decided *Cullman. City of Arab, et al. v. Arab Electric Cooperative, Inc. et al.,* No. CV-92-N-0379-M (N.D. Ala. July 6, 1992).

B. APPLICABLE FACTS

On or about September 28, 1987, the City of Calhoun ("Calhoun") enacted Calhoun Ordinance No. 361. This ordinance grants North Georgia EMC street franchise rights within the corporate limits of Calhoun for utility purposes conditioned upon North Georgia EMC meeting several conditions, including, *inter alia*, the payment of a fee equal to four (4%) percent of North Georgia EMC's gross revenues generated within the corporate limits of Calhoun, all as provided in said ordinance. North Georgia EMC expressly rejected said Calhoun Ordinance No. 361 and has refused to pay Calhoun any fees under the terms of the ordinance, although it has continued to use Calhoun's streets and right of ways to generate millions of dollars of revenues.

On or about October 26, 1992, Calhoun enacted Calhoun Ordinance No. 493. This ordinance provides for the imposition and collection of a four (4%) percent gross receipts business tax upon "each secondary supplier (including specifically Electric Membership Corporations whether or not operated for profit), within the meaning of O.C.G.A. §46-3-1, *et seq*., distributing and selling electric power within the City which is not otherwise paying a franchise fee pursuant to a franchise agreement," all as

provided in said ordinance.[6] Calhoun's charter empowers Calhoun to levy a business or occupation tax on a gross receipts basis.

North Georgia EMC refused to pay the business tax imposed by Ordinance No. 493, claiming that its contractual relationship with TVA constitutes a TVA "franchise" as that term is used in Section 831(l). However, Section 831(l) provides that the tax exemption only applies to the "franchises" of "the Corporation," that is, TVA, and makes no mention of purchasers of TVA power. North Georgia EMC is a creature of Georgia state law, which, according to its original petition filed in this case, "exists pursuant to the Georgia Electric Membership Corporation Act, O.C.G.A. §46-3-170, *et seq.*"

The City also points out that the TVA contract between TVA and North Georgia EMC specifically provides in Section 6

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[6] Calhoun adopted Ordinance No. 493 in response to North Georgia EMC's failure and refusal to comply with the terms of Ordinance No. 361. Ordinance Nos. 361 and 493 are mutually exclusive; i.e., if North Georgia EMC pays the franchise fees pursuant to Ordinance No. 361, it is not required to pay the business tax under Ordinance No. 493. Likewise, Ordinance No. 493 would not apply to North Georgia EMC if it were in compliance with Ordinance No. 361. Accordingly, North Georgia EMC is only required to make one payment in the amount of four (4%) percent of its gross revenues. While the case at bar has been on appeal, the Georgia Supreme Court decided the case involving the appeal of Ordinance No. 361, and held,

> For the reasons discussed in Division One, the City is authorized to adopt an ordinance conditioning the future grant of the requisite street franchise upon NGEMC's payment of a reasonable franchise fee and will be obligated to accept the grant of a street franchise on that condition if it intends to continue to use and occupy the City's streets for the purpose of providing electricity to its customers who live in the city. Upon the adoption of such an ordinance, NGEMC's continued use and occupancy of the City's streets for said purpose will render NGEMC liable for the payment of such fees and entitle the City to enforce compliance with such ordinance by an appropriate proceeding at law or in equity.

City of Calhoun v. North Georgia Electric Membership Corporation, 264 Ga. 205, 209-210 (1994).

that North Georgia EMC *agrees* to use the gross revenues from its electric operations for, *inter alia*, "current electric system operating expenses, including salaries, wages, cost of materials and supplies, *taxes*, power at wholesale." (emphasis added)

The legislative history of Section 831(l) clearly shows that the sentence relied upon by North Georgia EMC was added for *one and only one purpose* — to clarify that in agreeing to make "payments in lieu of taxes," the TVA (a federal entity) was not in any way agreeing (by implication) to be subject to state or local taxation on the entire properties TVA acquired from private utilities, which were covered by the whole concept of payments in lieu of taxes, or "replacement taxes." This fact was explained by TVA's then general counsel, who drafted the amendment, and explained by numerous member of Congress in hearings on the 1940 amendment before the U. S. Senate[7] and the House of Representatives.[8] *North Georgia Electric Membership Corporation v. City of Calhoun*, 264 Ga. 769, 770-772 (1994)[9]; *North Georgia Electric Membership Corporation v. City of Calhoun*, No. 27616 (Superior Court of Gordon County, Georgia, Jan. 11, 1994)[10]; *City of Centre, Alabama et al. v. Cherokee Electric Cooperative et al.*, No. CV-92-009, (Cherokee, Ala. Cir. Ct. July 23, 1993).[11]

SUMMARY OF THE ARGUMENT

North Georgia EMC's Petition for Writ of Certiorari should be denied because the case raises no special and important reasons to justify United States Supreme Court review.

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[7] *See: To Amend the Tennessee Valley Authority Act of 1933: Hearings on S.2925 Before a Subcommittee of Senate Committee on Agriculture and Forestry*, 76th Congress, 3d Sess. (1940).

[8] *See: To Amend the Tennessee Valley Authority Act of 1933: Hearings on S.1796 Before a Subcommittee of the House Committee on Military Affairs*, 76th Congress, 1st Sess. (1939).

[9] Petition for Writ of Certioriari, App. at 3a-7a.

[10] Petition for Writ of Certioriari, App. at 25a-41a.

[11] App. at A-10-A-16.

Further, there is no conflict among the United States courts of appeal or the state courts of last resort on the questions presented.

REASONS FOR DENYING THE PETITION

Petitioner North Georgia EMC urges the Court to grant its petition for writ of certiorari in this case because the Supreme Court of Georgia's holding conflicts with three unpublished United States District Court decisions from the Northern District of Alabama, *City of Sheffield v. Town of Cherokee*, No. 89-AR-5073-NW (N.D. Ala. Oct. 12, 1989), *Town of Courtland v. Town of North Courtland*, No. 90-L-1346-NE (N.D. Ala. Dec. 28, 1990), and *Cullman Electric Co-op v. City of Cullman*, No. CV-91-N-665-NE (N.D. Ala. Aug. 30, 1991), *appeal dismissed* (11th Cir. Jan. 15, 1992).

Conflicts between (a) two state courts of last resort, or (b) a state court of last resort and a United States court of appeals, may constitute sufficient cause for the Court to grant writs of certiorari; however, conflicts between a state court of last resort and a federal district court rarely warrant certiorari in the absence of some other important concern particularly when the federal district lacked subject matter jurisdiction. ROBERT L. STERN ET AL., SUPREME COURT PRACTICE, §4.8, pp. 178-80 (7th ed. 1993). There is no other important concern presented by this case, because North Georgia EMC is a mere purchaser of TVA power and not entitled thereby to an exemption from state and local taxation.

It is clear that the Georgia Supreme Court's holding in this case is undeniably correct. North Georgia EMC's argument that Section 831(l) exempts North Georgia EMC from taxation, including taxation under Calhoun Ordinance No. 493, is based on only one sentence in the code section, which provides:

> The payments herein authorized are in lieu of taxation, and *the Corporation* [TVA], *its* property, *franchises* and income *are hereby expressly exempted from taxation* in

> any manner or form by any state, county, municipality, or any subdivision or district thereof.[12]

16 U.S.C. §831(l) (emphasis added). The "payments" referenced in this sentence are "payments in lieu of taxes" to be paid by the TVA to make up for lost tax revenues to state and local governments when TVA acquired the power supply operations of private utility companies, which were subject to taxation prior to being acquired by the TVA. These payments were described as "payments in lieu of taxes" to underscore that the TVA, as a federal entity, was exempt from taxation.

North Georgia EMC has attempted to rely on *Sheffield*, *Courtland*, and *Cullman* which suggest that entities such as North Georgia EMC may constitute "franchises" within the meaning of Section 831(l), and hence are exempt from taxation. However, these opinions misinterpret the meaning of the term "franchises" as used in Section 831(l) which is the result of the courts' failure to conduct a proper analysis of the substantial legislative history surrounding Section 831(l). The ill-reasoned basis of these opinions has already been attacked by an Alabama court with proper jurisdiction in an order dated July 23, 1993:

> The *Sheffield* case, and others following it, are simply not supported by the definition of a franchise existing at the time of the enactment of the TVA Act, nor by the judicial precedent of that time defining the relationship between a utility supplier and a utility distributor. *Sheffield* fails to consider the substantial legislative history, administrative interpretation, and congressional acquiescence concerning the payment of taxes by cooperative power distributors.

City of Centre, Alabama et al. v. Cherokee Electric Cooperative et al., No. CV-92-009, (Cherokee, Ala. Cir. Ct. July 23, 1993) (appeal pending, Alabama Supreme Court).[13]

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[12] Petition for Writ of Certioriari, App. at 47a.

[13] App. at A-15

Calhoun submits that a thorough understanding of the legislative history of Section 831(l), clearly shows that this sentence was inserted in Section 831(l) by a 1940 Amendment to the TVA Act for one and only one simple purpose — to clarify that in agreeing to make "payments in lieu of taxes," the TVA (a federal entity) was not in any way agreeing (by implication) to be subject to state and local taxation on the entire properties TVA acquired from private utilities, which was covered by the whole concept of payments in lieu of taxes, or "replacement taxes."

In *Centre*, the Alabama Circuit Court expressly found that "distributors of TVA supplied electricity are simply not franchises within the meaning of Section 13 [16 U.S.C. §831(l)] of the TVA Act," further noting that:

> This court is of the opinion that the *Sheffield* decision is wrong, but even if it is not wrong, it certainly has no application to the instant case, because the instant case involves the taxation of cooperatives by municipalities, rather than the taxation of municipalities by other municipalities.

Id.

Once the extensive legislative history of Section 831(l) is reviewed, it becomes clear that Congress' use of the term "franchises" simply is not consistent with North Georgia EMC's suggested meaning. It becomes patently obvious that the "franchises" which are exempted from taxation are the franchises directly granted to the TVA by municipalities to provide electrical service within their corporate limits and the franchise granted to TVA by the federal government by charter authority. *North Georgia Electric Membership Corporation v. City of Calhoun*, 264 Ga. 769, 771-772 (1994).[14] The term "franchises" simply has nothing to do with the relationship between the TVA and electrical cooperatives such as North Georgia EMC.[15]

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[14] Petition for Writ of Certioriari, App. at 4a-6a.

[15] That electric cooperatives which purchase power from the TVA are not exempt from taxation by virtue of Section 831(l) is underscored by the

(footnote continues)

The Georgia Supreme Court followed this same logic in its well-reasoned opinion in this case. Calhoun submits that the court's rationale exposes the patently unreasoned and unsupported nature of the *Sheffield*, *Courtland*, and *Cullman* opinions. Given the comparative level of analysis employed in the Georgia Supreme Court's opinion in this case and the Alabama Circuit Court's opinion in *Centre*, as compared with that of the *Sheffield*, *Courtland*, and *Cullman* opinions (where the court lacked jurisdiction), there is no basis for finding a sufficient level of judicial confusion to warrant certiorari review.

Finally, the issue of whether electric cooperatives like North Georgia EMC constitute "franchises" within the meaning of Section 831(l) simply does not rise to the level of national importance which warrants certiorari review by this Court. The issue has been raised only in isolated cases which are not a part of any more global national concern. The existence of well-reasoned opinions such as the Georgia Supreme Court's opinion in this case and the Alabama Circuit Court's *Centre* opinion will provide ample guidance to other courts in entertaining this issue and properly analyzing the legislative history.

(footnote continued)

TVA's December 22, 1944 Report submitted to Congress in accordance with the last paragraph of Section 831(l). The 1944 Report is replete with examples where TVA reaffirms, and in fact emphasizes, that coops purchasing TVA power are subject to taxation. Importantly, at p. 24 of the Report, TVA includes a section entitled "Tax and In-Lieu Payments by Local Distribution Systems." In this section, TVA states:

> Although recognized as a part of the TVA regional power development, the municipal and cooperative systems which purchase power from the TVA for resale are locally owned. *The electric cooperatives* [like North Georgia EMC] *are private cooperatives and are subject to taxation unless specifically exempted . . .*

See also TVA 1944 Report at pp. 26, 41.

CONCLUSION

For all these reasons, this Court should deny the petition for writ of certiorari requested by North Georgia EMC.

This 19th day of April, 1995.

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APPENDIX

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City of Centre, Alabama et al. v. Cherokee Electric Cooperative et al., Civil Action No. CV-92-009, (Cherokee, Ala. Cir. Ct. July 23, 1993) A-1

CITY OF CENTRE, ALABAMA; TOWN OF GAYLESVILLE, ALABAMA; AND TOWN OF LEESBURG, ALABAMA, *Plaintiffs/Class Representatives* and CITY OF ARAB; CITY OF BOAZ; TOWN OF BRIDGEPORT, ALABAMA TOWN OF FALKVILLE, ALABAMA; AND CITY OF STEVENSON, ALABAMA, *Plaintiffs/Intervenors* vs. CHEROKEE ELECTRIC COOPERATIVE; ARAB ELECTRIC COOPERATIVE; JOE WHEELER ELECTRIC MEMBERSHIP CORPORATION; MARSHALL-DEKALB ELECTRIC COOPERATIVE; NORTH ALABAMA ELECTRIC COOPERATIVE; AND SAND MOUNTAIN ELECTRIC COOPERATIVE, *Defendants*	IN THE CIRCUIT COURT OF CHEROKEE COUNTY, ALABAMA CIVIL ACTION NO. CV-92-009

ORDER

Under Title 11-51-90, 91 *Code of Alabama* (1975), municipalities are authorized to impose license taxes on businesses which operate within their city limits or police jurisdiction. Among the businesses taxed by the municipalities are the defendant electric cooperatives which purchase electric power from the Tennessee Valley Authority for resale within their city limits or police jurisdiction.

Under 16 U.S.C. §831*l* (hereinafter referred to as Section 13) of the TVA Act, the Tennessee Valley Authority " . . . its property, franchises and income, are . . . expressly exempted from taxation in any manner or form by any state,

county, municipality, or any subdivision or district thereof." The defendant cooperatives, therefore, contend that they, as "franchises" of TVA, are exempt from taxation by the municipalities which they serve. The term "franchise" is not defined by the TVA Act.

Under 16 U.S.C. §831*i* (hereinafter referred to as Section 10) of the TVA Act, TVA is authorized to sell its surplus power "to States, counties, municipalities, corporations, partnerships or individuals . . . " for resale by such entities on the terms and conditions established by TVA. The defendant cooperatives in this case have power distribution contracts with TVA. Under those contracts the cooperatives buy electricity from TVA and resell it to the customers of the cooperatives. The term "franchise" is not, however, used or defined in the contracts between TVA and the cooperatives.

The cooperatives were all created and operate under general Alabama State Law.[1] As power distributors the cooperatives may generally acquire, construct, and maintain power distribution systems. Such systems generally include, among other things, land, buildings, and other structures. Such businesses and facilities would, unless exempt, be subject to taxation under Alabama law.[2]

When the Tennessee Valley Authority was established in 1933 it acquired previously investor-owned utilities which had generated substantial tax revenues in Tennessee and Alabama. As an instrumentality of the federal government, however, TVA was constitutionally exempt from such taxation.[3] Accordingly,

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[1] Title 37-6-1 through 30 *Code of Alabama* (1975).

[2] In addition to the municipal license taxes made the subject of this case, the State of Alabama, through its *amicus curiae* brief represents to the Court that in 1992 the cooperatives paid $785,000.00 in state, county and municipal ad valorem taxes; $113,000.00 in state and local use taxes; and for the tax year 1991-92 the cooperatives paid more than $3,079,000.00 in state utility license taxes.

[3] The supremacy clause of the United Stated Constitution, Art. VI, cl 2, provides as follows: "This Constitution, and the Laws of the United States

(footnote continues)

the TVA Act was amended in 1940 to provide for payments by TVA to state and local governments "in lieu of taxation." To this day TVA continues to make payments in-lieu-of-taxes to the state and local governments "in which the Corporation . . . acquired properties previously subject to state and local taxation". The clear intent of Section 13 was to assure that the tax revenues lost by state and local governments by virtue of acquisition of property by TVA would be replaced, at least in part, by payments in-lieu-of-taxes.[4]

What is left unclear under Section 13 is whether TVA power distributors are exempt from taxation. Following that portion of Section 13 providing a formula for in-lieu-of-tax payments by TVA to state and local governments, Congress reiterated that TVA "its property, franchises and income, are hereby expressly exempted from taxation . . . ."

(footnote continued)

which shall be made in Pursuance thereof; . . . , shall be the supreme Law of the Land . . . "

In *McCullough v. Maryland*, 4 Wheat (U.S. 316, 4 L. Ed. 579, 609 (1819), the Supreme Court held that state governments "have no power, by taxation, or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress, to carry into effect the powers vested in the national government."

[4] The defendant cooperatives seem to suggest that the local governments are receiving more through the TVA in-lieu-of-tax payments, than they would receive if the TVA were taxed as a privately owned power generating business.

Section 13 of the TVA Act provides a formula for in-lieu-of-tax payments by TVA, and establishes a minimum below which such payments may not fall. However, the minimum is based on the two average of ad valorem taxes for the "last two years during which said property was privately owned and operated . . . "

There is nothing before the Court at this time to establish what the current ad valorem taxes would be, if TVA property were investor owned, nor is there any evidence of the other tax revenues that the State and local governments would receive from TVA if it were an investor owned utility. Therefore, any suggestion, or implication, that the in-lieu-of-tax revenue of the cooperatives is greater than it would be if TVA were investor owned, is speculative.

The defendant cooperatives contend that they are "franchises" of TVA, and therefore exempt from taxation. The defendants even seem to contend that all distributors of TVA power are franchises of TVA. At the very least, the defendants blur any distinctions between cooperatives and municipalities. This Court is of the opinion that this distinction is an important consideration in determining whether distributors of TVA power are "franchises" of TVA.

Under Paragraph 4 of Section 13, TVA is authorized to provide in its contracts with municipal power distributors, for the resale of power by such municipalities at rates which may include an amount to cover tax equivalent payments to the municipality "in lieu of . . . taxes upon any distribution system or property owned by the municipality." This Court is not aware of any provision of the law which authorizes a municipality to tax its own assets, or income and, in effect, pay taxes to itself; however, under this provision, a municipal distributor is authorized to charge its customers a rate which would generate a "tax equivalent" revenue for the municipality.

Likewise, under Section 13 and the TVA contracts, the municipal power distributors are obligated to make "proper distribution" of the in-lieu-of-tax payments to the municipalities which the distributors serve. *Town of North Courtland v. Town of Courtland*, 597 So. 2d 1336 (1992). Therefore, if the power distributors in the instant case were municipalities, rather than electric cooperatives, there would be a means or method whereby the municipal distributors could set their power rates to assure themselves, and the other municipalities which they serve, that tax equivalent revenues would be available to such municipalities in lieu of taxes.

Section 10 authorizes TVA to set the rates for the resale of power by the distributors. In setting their rates, TVA considers the operational and other costs incurred by its distributors. Under section 6 of the TVA contracts with municipal distributors that includes "tax equivalent" payments. Under section 6 of the TVA contracts with cooperatives that includes "taxes."

Under the theory argued by the cooperatives in this case, municipalities which are served by electric cooperatives would lose tax revenue and recover no in-lieu-of-tax payments, while municipalities which are themselves power distributors, or are served by municipal power distributors, would receive such revenue. Congress could not have intended this unequal and unfair result.

Because Section 10 of the TVA Act allows States, counties, municipalities, corporations, partnerships, and individuals, to purchase power from TVA for resale, each of these entities would be exempt from taxation as a franchise of TVA under the argument asserted by the defendant electric cooperatives in this case. If the Alabama Power Company buys electricity from TVA for resale, surely the Alabama Power Company would not thereby be exempt from taxation as a franchise of TVA.

The reason that municipal power distributors are specifically dealt with under Paragraph 4 of Section 13 is because of their distinct nature. Municipalities could not tax themselves,[5] and there may be a restriction on the authority of one municipality to tax another.[6] Just as Congress did no want state and local governments to be penalized by the TVA acquisition of power generating facilities, Congress did not want municipalities to be penalized by municipal acquisition of power distributing facilities.

In *City of Tullahoma v. Coffee County*, Tennessee, 328 F.2d 683 (1964) the Sixth Circuit Court of Appeals undertook to

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[5] In the 1944 Tennessee Valley Authority Report to Congress on Section 13 of the TVA Act, TVA explained:

> Municipal systems are exempt from federal taxes and from state and local levies in each of the six states affected, although payments in lieu of property taxes are provided for by legislative act in some instances. The power contracts and agreements, through which the TVA exercises its responsibilities for the distribution of electric power, make provision for payments by municipal systems in lieu of state and local property taxes. (p. 39)

[6] *Town of Mulga v. Town of Maytown*, 502 So. 2d 731 (1987).

construe Section 13 of the TVA Act. In doing so the Court considered the language of the statute, legislative history, administrative interpretation, and acquiescence by Congress. In the instant case the parties have established an extensive record, and have filed extensive briefs addressing each of these areas for interpretation of Section 13 under the facts of this case.

The statutory language of Section 13 provides no guidance to aid the Court in construing the term "franchise". In *City of Sheffield v. Town of Cherokee*, No. 89-AR-5073-NW (N.D. Ala., Dec. 12, 1989), Judge Acker opined that the meaning of the term is "far from clear."

From the very earliest history of this country, the term "franchise" has been recognized as a government charter to conduct certain types of activities. See *McCullough v. Maryland,* 4 Wheat (US) 316, 4 L. Ed. 579, 599 (1819). In *Sheffield* Judge Acker acknowledged this long standing definition of the term when he stated:

> Long before the term became used in distributorship relations, a "franchise" was known as a special privilege conferred upon individuals or corporations by government authority to do something that could not be done of common right. *Bank of Augusta v. Earle*, 38 U.S. 519 (1838).

It is this general definition of the term "franchise" which existed at the time of the creation of the Tennessee Valley Authority.

TVA is a federally chartered corporation created "in the interest of the national defense, and for agricultural and industrial development, and to improve navigation . . . and to control the destructive flood water in the Tennessee River and Mississippi River Basins."[7] The TVA was granted the authority

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[7] 16 U.S.C. 831. For the purpose of carrying out these general objectives, the TVA was granted the "power" among others, to exercise the right of eminent domain in the name of the United States of America; to construct dams and operate power generating facilities.

to do that which could not be done without such "special privilege conferred" by the United States Congress. TVA was granted a charter to exercise the power of government. TVA's charter and its powers thereunder constitute the "franchises" of TVA.

The defendant cooperatives argue that their authorization to distribute power, which arises from their power distribution contracts between the cooperatives and TVA, give them status as "franchises" of TVA.

In *Griffin v. Oklahoma Natural Gas Co.*, 37 F.2d 545 (1930) the defendant argued that a contract for the supply of natural gas between the City of Iola, Kansas, and Oklahoma Natural Gas Corporation was void because Kansas law provided that "No person, firm or corporation shall ever be granted any exclusive franchise, right or privilege whatever." The contract provided that Oklahoma Natural Gas was to be the sole supplier of gas for the City "in the operation of the [the City's] electric light and water works power plant, and the City agreed to use only natural gas for fuel in the operation of such power plant." The *Griffin* Court held that a contract of supply from one utility for use by another utility is not a franchise. Although the *Griffin* case predates the creation of TVA, it was the most pertinent statement of the legal relationship between a utility supplier and its distributor existing at the time of the enactment of the TVA Act.

The power distribution contracts between TVA and the cooperatives provide that the contracts are "subject to the TVA Act". TVA has included in its standard contracts with its distributors provisions requiring that they conduct their activities so as to carry out the federal objectives expressed in the TVA Act. The Courts have consistently held that power distributors must comply with the controls included in the power contracts.[8]

Although this Court recognizes that the conduct of the cooperatives is highly regulated, the relationship between TVA

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[8] In *City of Middlesboro v. Kentucky Utilities Co.*, 146 S.W.2d 48 (1940) the Court held that a Kentucky municipality could not validly enter into a standard TVA power contract, because a Kentucky statute vested the local authorities with "absolute and exclusive control" of the utility system.

and the cooperatives, as well as the "control" of TVA over a cooperative's activities, arises from these contracts, and it is on the basis of general contract law that these controls have long been upheld by the Courts.[9] The mere exercise of "control" by TVA over a power distributor's activities under a contract, does not create the relationship of franchisor and franchisee as the term was known and used when TVA was created.

In *Alabama Power Company v. Alabama Electric Coop.*, Inc., 394 F.2d 972, cert. denied, 393 US 1000 (1968) the Rural Electric Cooperative (REA) proposed to make a loan to the Alabama Electric Cooperative (AEC) to finance the construction of power generating and distribution facilities. As security for the loan REA required AEC to enter into 35 year contracts with each of the fourteen electric cooperatives which the AEC would serve. The Court held the AEC was immune from suit under federal antitrust laws for doing that which it was required to do by the REC. Because the REC is immune from suit under the antitrust laws, a borrower which complies with the REC loan requirements is likewise immune as an "instrumentality of the United States."

Although the defendant electric cooperatives cite the *Alabama Electric Cooperative* case to support their argument that the cooperatives are franchises of TVA, the cooperatives do not argue that they are immune from taxation as instrumentalities of the federal government. In other words, a cooperative's immunity under the *Alabama Electric Cooperative* case is limited to the narrow facts of that case and similar litigation.[10]

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[9] In *Tennessee Valley Authority v. Lenoir City, Tenn.*, 72 F. Supp. 457 (E.D. Tenn. 1947) the Court held a municipal ordinance unconstitutional and invalid as cooperative of the municipalities' power distribution contract with TVA because the ordinance required the municipality to increase power rates contrary to the rate structure in the contract.

[10] The U.S. Supreme Court adopted what has come to be known as the *Parker* doctrine when, in 1943, it held that "nothing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers or agents from activities directed by its

(footnote continues)

When Congress amended the TVA Act in 1940, it was reacting to the need to insure to the States an income stream to replace tax revenue that would be lost by federal acquisition of previously investor owned electric utilities. During the Congressional hearings on this subject, there was an expressed concern that the language authorizing such payments "in lieu of taxation" was a tacit or implied recognition by Congress that TVA was subject to taxation.[11]

After discussing the then existing policy and practice of sharing with States the revenue from the sale of forest products from federally owned land, the royalties under federal oil and mineral leases, there was the following exchange between Congressman Joseph Smith of Connecticut and Mr. William C. Fitts, General Counsel of TVA:

> Mr. Smith. In none of those statutes, however, does the Federal Government admit that property held by it for Federal purposes is taxable by the State?
>
> Mr. Fitts. Oh, no.
>
> Mr. Smith. Does not this language on page 2, in which you say "to be made upon condition that no State, county, or local taxes shall be assessed or levied against the property, operations, or business of the corporation" make an admission that there may be a right in the State, county, or locality to tax this property which is held, as we claim, for a Federal purpose?
>
> Mr. Fitts. Of course, I do not think so, and, if it does, I should like to see it changed.

(footnote continued)

legislature." *Parker v. Brown*, 317 US 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). In the years since that opinion the contours of this exclusion have been constantly redefined. the Parker doctrine is not applied automatically, and a thoughtful analysis is called for in each case to ensure that it is a bona fide governmental decision for which the exemption is sought.

[11] Hearings on H.R. 7424 TO AMEND THE TENNESSEE VALLEY AUTHORITY ACT OF 1933, before the House Committee on Military Affairs, January 23, 1940.

> Mr. Smith. Should not that language be stricken out and any such apparent admission definitely denied in any legislation we enact granting payment in lieu of taxes?
>
> Mr. Fitts. I think it should. What that language is intended to do, and I think it does, but we can make it much more explicit, and the more explicit the better pleased I am, certainly — but what that language is intended to do is to make clear that Congress is asserting this property is immune and exempt from State and local taxation.
>
> Mr. Smith. It should so state.
>
> Mr. Fitts. And that this is a voluntary in-lieu payment, and recognizing that.
>
> * * *
>
> Mr. Smith. This language, then, that such payments should be made upon condition that no State taxes shall be levied does not occur in those acts, does it?
>
> Mr. Fitts. I do not think so.
>
> Mr. Smith. Do you recall any others?
>
> Mr. Fitts. I do not think so. I think that language can probably be omitted by saying this property shall remain exempt from State taxes.[12]

This dialogue is the principal exchange in which there was a discussion about eliminating the "admission" that TVA was subject to taxation. The provision in question was replaced with the Congressional reaffirmation that TVA, "its property, franchises and income" are exempt from taxation, and Mr. Fitts later

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[12] *Id.* at 17-18.

testified that by making this change Congress was "asserting the Federal exemption from taxation for this property . . . ."[13]

The Congressional record is replete with evidence that both before and after the above quoted testimony, Congress intended for cooperatives to remain subject to state and local taxation. Testifying before Congress in 1939, William C. Fitts, as then Solicitor of TVA, stated that if there was going to be a tax loss to states and local governments by virtue of municipalities and cooperatives acquiring power distribution facilities, that matter should be left to the state government. He opined that properties that were to be acquired by state agencies, municipalities and cooperatives would be "clearly taxable by the states just as the private utilities were before."[14]

When the bill was introduced, Congressman John Sparkman introduced into the record a letter from the Chairman of the Board of TVA which stated in part:

> . . . the only subject dealt with in this recommended draft of bill is the Federal Government's contribution on property it owns; the contribution to the State and local subdivisions by municipalities and other public agencies owning their own electric facilities is, of course, not included in these computations nor covered by this proposed bill.[15]

In support of the bill, William C. Fitts, as General Council of TVA, testified before the House Committee as follows:

> . . . the rural distribution lines were sold not to the TVA but to the cities and rural cooperative associations. Now, those properties you are not to be concerned with . . . because the State can tax those

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[13] Hearing on S. 2925 TO AMEND THE TENNESSEE VALLEY AUTHORITY ACT OF 1933, before the Senate Subcommittee of the Committee on Agriculture and Forestry, February 23, 1940, p. 16.

[14] Hearings on S. 1796 TO AMEND THE TENNESSEE VALLEY AUTHORITY ACT OF 1933, before the House Subcommittee on the Committee on Military Affairs, June 5, 1939, p. 309.

[15] 84 *Congressional Record* 10601, 10602 (1939).

> properties . . . . They are owned by State agencies and are still subject to State taxation . . . .[16]

Before the Senate Committee one month later Mr. Fitts reemphasized his position on this subject in the following exchange:

> Mr. Fitts. . . . The generating and transmission properties were transferred to the TVA and acquired and held in the name of the United States. So that those properties are not now subject to State taxation, and it is those generating and transmission properties that raise the problem that we are dealing with here. But the distribution properties, which constituted the larger part of the system in value and in taxable value, the distribution properties were transferred either to municipalities or to rural cooperative associations, and are held and operated by them.
>
> Senator Norris. And owned by them.
>
> Mr. Fitts. And owned by them. And of course, they remain subject to State taxation, while the legislation in all of the States does not cover them, the State has the power to levy taxes on those properties and can recover those taxes. So that is not a congressional problem. It is a problem to be solved by the States through their own legislatures.[17]

Immediately following the Senate's agreement to the amendment involving the franchise exemption, Senator George W. Norris of Nebraska explained that the bill involved only the property of the federal government, not the property of municipalities or cooperatives.[18]

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[16] Hearings on H.R. 7424 TO AMEND THE TENNESSEE VALLEY AUTHORITY ACT OF 1933, before the House Committee on Military Affairs, January 23, 1940, pp 209-210.

[17] Hearings on S. 2925 TO AMEND THE TENNESSEE VALLEY AUTHORITY ACT OF 1933, before the Senate Subcommittee of the Committee on Agriculture and Forestry, February 23, 1940, p. 8.

[18] 86 *Congressional Record*, 5239 (1940).

Not only does the legislative history support the conclusion that Congress intended for cooperatives to remain subject to State and local taxation, the power distribution contracts between TVA and each of the cooperatives include a provision at section 6(a) that cooperatives may use their gross revenues for, among other things, the payments of taxes. Each year the TVA reviews cooperatives' expenditures, including tax payments, and, each year, the TVA sends its reports to Congress.

In 1944, when TVA gave its required report to Congress, TVA stated:

> The electric cooperatives are private corporations and are subject to taxation unless specifically exempted. In Alabama the cooperatives are subject to State and local taxation on a basis comparable with other private business enterprises . . . .[19]

For approximately fifty years the contract provision authorizing cooperatives to pay taxes has remained intact.

The defendant cooperatives have been unable to furnish this Court with any legislative history or administrative interpretation which evinces a Congressional intent or administrative interpretation contrary to that which has been set out hereinabove. The defendant cooperatives purport to rest their case, in large part, on a series of unpublished decisions originating in the Federal District Court for the Northern District of Alabama.

The pivotal case on which the defendant cooperatives rely is *City of Sheffield v. Town of Cherokee*, CV-89-AR-5073-NW (N.D. of Ala. Oct. 12, 1989). In this case Sheffield sold its TVA supplied electricity to the town of Cherokee. When Cherokee sought to collect a gross receipts tax under its city ordinance, Sheffield filed suit to have the Court determine whether such tax was payable by Sheffield.

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[19] 1944 Tennessee Valley Authority Report to Congress on Section 13 of the TVA Act, p. 38.

It is important to note that the *Sheffield* case involves a municipal distributor of power rather than a cooperative distributor of power. Citing the case of *Town of Mulga v. Town of Maytown*, 502 So. 2d 731 (1987), the *Sheffield* Court noted that under Alabama law one municipality may not tax another unless the other is exercising a proprietary or business function within the jurisdiction of the first. Since Sheffield was not selling electricity for a profit, Sheffield would not be subject to taxation. In other words, the *Sheffield* Court reasons that municipal power distributors of TVA are "contractually bound to operate their facilities at a zero profit margin, hence not making revenue," and are therefore exempt from local taxation.

The case of *Town of Courtland v. Town of North Courtland*, No. CV-90-L-1346-NE (N.E. Ala. Dec. 28, 1990), also involved a municipal distributor of TVA power, and in that Court's single page order adopted the "non profit" rational of *Sheffield*, and held that the town of North Courtland could not impose a tax on the town of Courtland's electric operation.

While the *Courtland* case was before the Federal District Court, corresponding litigation was proceeding in the state circuit court. The state court granted a summary judgment in favor of the power distributor after "having considered the contract . . . between [TVA] . . . and the Town of Courtland . . . the rationale of . . . *Sheffield*, . . . and the [federal court] order . . . in Courtland." In *Town of North Courtland v. Town of Courtland*, 597 So. 2d 1336 (1992), the Supreme Court of Alabama ruled that the state circuit court was "justified in relying on the [federal courts'] recognition . . . that §831*l* prohibits a municipality from levying 'a tax against another municipal corporation which operates an electric operation on a non-profit basis pursuant to the TVA Act." Clearly, neither the state trial court, nor the Alabama Supreme Court, considered the record which has been constructed in the instant case. If such a record had been before the court, no summary judgment would have been entered at the trial level, nor upheld on appeal.

The case of *Cullman Electric Cooperative v. The City of Cullman*, CV-91-N-665-NE (N.E. Ala., Aug. 30, 1991), involved

a cooperative distributor of power. That Court, however, failed to recognize any distinction between municipal and cooperative power distributors, and extended the *Sheffield* decision to all nonprofit distributors of TVA power.

The TVA specifically provides in section 6 of its contracts with municipal distributors that such distributors may make "tax equivalent" payments to the municipalities which they serve. The TVA specifically provides in section 6 of its contracts with cooperative distributors that such distributors may make "tax" payments. For the *Cullman Electric* Court to hold that a cooperative is contractually precluded from paying such taxes, ignores the clear language of the contract.

This Court is of the opinion that if the *Sheffield* decision is correct, it is correct because of the legal principles pertaining to the taxation of one municipality by another, and on the basis of the language of paragraph 4 of Section 13. Unfortunately, however, the *Sheffield* Court sought to support its result by concluding that a municipal power distributor is a "franchise" of TVA.

The *Sheffield* case, and others following it, are simply not supported by the definition of a franchise existing at the time of the enactment of the TVA Act, nor by the judicial precedent of that time defining the relationship between a utility supplier and a utility distributor. *Sheffield* fails to consider the substantial legislative history, administrative interpretation, and Congressional acquiescence concerning the payment of taxes by cooperative power distributors.

This Court is of the opinion that the *Sheffield* decision is wrong, but even if it is not wrong, it certainly has no application to the instant case, because the instant case involves the taxation of cooperatives by municipalities, rather than the taxation of municipalities by other municipalities.

Distributors of TVA supplied electricity are simply not franchises within the meaning of Section 13 of the TVA Act.

On the basis of the findings of this Court, whether set out herein, or not, it is

ORDERED, ADJUDGED, AND DECREED, as follows:

1. The defendants are subject to the imposition of municipal license taxes under Title 11-51-90, 91 *Code of Alabama*, (1975).

2. The license taxes imposed by the members of the plaintiff class and the plaintiff intervenors, on the defendant cooperatives, pursuant to Title 11-51-90, 91 *Code of Alabama* (1975) are valid under state and federal law.

3. The parties shall advise this Court, within 15 days, of their respective proposals for the scheduling of the final hearing on the plaintiffs' claims for damages and other relief.

4. The parties shall advise this Court, within 15 days, of their respective positions as to whether there is any just reason for delay in making this Order a final order under ARCP 54(b).

DONE this day, July 23, 1993.

/s/
David A. Rains, Circuit Judge